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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1990

The State of OHIO, EX REL. Richard G. JOHNSON, Esquire,

Petitioner,

-vs-

The Honorable Terrence O'DONNELL, Judge,

Prudential-Bache Securities, Inc.,

-and-

Jay H. Salamon, Esquire,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

Petition for a Writ of Certiorari

•**Richard G. Johnson, Esquire,** *Counsel Pro Se of Record,* 11477 Mayfield Road, Suite 814, Cleveland, Ohio 44106-5906, 216/229-6777 *telephone,* 216/229-1447 *facsimile, Petitioner Pro Se.*

Dated: May 20, 1991

A. THE QUESTIONS PRESENTED FOR REVIEW

1. WHETHER the State of Ohio denied the Petitioner his right to procedural due process (right to a hearing) by granting him a statutory right of appeal from the final judgment in this original action before the Supreme Court of Ohio but by failing to provide any appellate jurisdiction or procedure therefrom?

2. WHETHER the Supreme Court of Ohio denied the Petitioner his right to procedural due process (right to a fair and impartial trial) by *sua sponte* dismissing the Petitioner's original action after considering it on the merits?

3. WHETHER the Supreme Court of Ohio denied the Petitioner his right to procedural due process (analogous right of access to the courts), where the Supreme Court of Ohio *sua sponte* dismissed the Petitioner's original action before it after considering the Case on the merits, and by refusing upon demand to issue findings of fact and conclusions of law and/or an opinion as required by law?

B. THE PARTIES

1. Richard G. Johnson, Esquire, Petitioner.

2. The Honorable Terrence O'Donnell, Judge,* Respondent.

3. Prudential-Bache Securities, Inc.,† Respondent.

4. Jay H. Salamon, Esquire,‡ Respondent.

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* The Court of Common Pleas for Cuyahoga County, Ohio.

† N.k.a. Prudential Securities, Inc., a wholly-owned subsidiary of the Prudential Securities Group, which is a wholly-owned subsidiary of the Prudential Insurance Company of America.

‡ Partner, Hermann, Cahn & Schneider, Cleveland, Ohio.

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2. The Petitioner has a substantive right under Ohio law to an impartial adjudication of his legally cognizable claims. The Petitioner has the same procedural due process right as guaranteed by the fourteenth amendment to the Constitution. All authorities agree that the judgment of a partial tribunal is void or voidable; however, what constitutes partiality has hardly begun to be fleshed out by the courts, and such reported cases usually deal with *ex ante* reasons for disqualification. This Case presents the issue of what to do with *ex post* reasons for disqualification; here, the partiality arose from the entirely bizarre and totally unfounded dismissal, *sua sponte*, by the Supreme Court of Ohio of the Petitioner's Case. Judicial ethics experts agree that this type of conduct represents disqualifiable partiality. As such, the Petitioner was denied his procedural due process right to a fair trial by the Supreme Court of Ohio 17

3. The Supreme Court of Ohio considered this Case below on the merits; however, the Supreme Court of Ohio has refused to enter a judgment for or

against the Petitioner. Instead, the Supreme Court of Ohio dismissed the Case below, and it has so far refused—in violation of Ohio law—to explain its reasons therefor. This conduct, *per se*, denied the Petitioner his procedural due process right of access to the courts as guaranteed by the fourteenth amendment to the Constitution 22

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•**Richard G. Johnson, Esquire,** *Counsel Pro Se of Record*, 11477 Mayfield Road, Suite 814, Cleveland, Ohio 44106-5906, 216/229-6777 *telephone*, 216/229-1447 *facsimile*, *Petitioner Pro Se.*

Dated: May 20, 1991

E. THE OFFICIAL AND UNOFFICIAL REPORTS

There are no opinions below.

All of the judgment entries below are set-out in section J. Appendix I-VII, at pp. B-J. Some of the judgment entries are reported at the following: 49 Ohio St. 3d 704, 551 N.E.2d 615 (1990); 53 Ohio St. 3d 709, 559 N.E.2d 1366 (1990); 57 Ohio St. 3d 712, ___ N.E.2d ___ (1991); and 58 Ohio St. 3d 704, ___ N.E.2d ___ (1991).

F. THE STATEMENT OF JURISDICTION

On or about January 30, 1991, the Supreme Court of Ohio, *sua sponte*, DISMISSED the relator's, Richard G. Johnson ("Petitioner" or "Relator" or "Johnson"), original action therein. On or about February 27, 1991, the Supreme Court of Ohio DENIED the Relator's motion for a rehearing therein. As such, this Petition is due in this Court on or about May 28, 1991. FED. R. SUP. CT. 13.1 and 13.4.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a) (1988) ("Final judgments or decrees rendered by the highest court of a [s]tate in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any . . . right [or] privilege . . . is specially set up or claimed under the Constitution . . . .").

The intervention by the State of Ohio may be appropriate. 28 U.S.C. § 2403 (b) (1988).

G. THE CONSTITUTIONS AND STATUTES INVOLVED

I. **U.S. CONST. amend. XIV, § 1—**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Untied States and of the [s]tate wherein they reside. No [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. **28 U.S.C. § 1257 (1988)—**

(a) Final judgments or decrees rendered by the highest court of a [s]tate in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any [s]tate is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a [s]tate" includes the District of Columbia Court of Appeals.

III. **28 U.S.C. § 2403 (1988)—**

(a) In any action, suit or proceeding in a court of the United States to which the Untied States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the Untied States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable

provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a [s]tate or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that [s]tate affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the [s]tate, and shall permit the [s]tate to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The [s]tate shall, subject to the applicable provisions of of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

IV. OHIO CONST. art. I, § 16—

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

V. OHIO CONST. art. IV, § 2—

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of

administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

VI. OHIO REV. CODE ANN. § 2505.02 (Baldwin 1991)—

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

VII. OHIO REV. CODE ANN. § 2505.03 (Baldwin 1991)—

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer,

agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119, or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

H. THE STATEMENT OF THE CASE

Please note that the complete procedure of this Case in the Supreme Court of Ohio is contained in section J. Appendix-VIII, pp. K-S.

In the Fall of 1989, the Relator filed a petition for writs of mandamus and procedendo against the respondent, Judge Terrence O'Donnell ("Respondent"), in regards to a still-pending civil action before him. One of the defendants therein, Prudential-Bache Securities, Inc. ("Prudential-Bache"), and one of its attorneys, Jay H. Salamon, Esquire ("Salamon") (collectively "Intervening Respondents"), intervened therein. By late Summer of 1990, and after an extraordinary amount of motion practice, the Relator had prevailed on motions to dismiss his complaint, motions for summary judgment, and motions for sanctions; the Parties had presented all of the evidence they chose to proffer; and the Supreme Court of Ohio had explicitly set this Case's briefing schedule. By or about September 19, 1990, this Case had been presented to the Supreme Court of Ohio on the merits.[1]

On or about January 30, 1991, the Supreme Court of Ohio, *sua sponte*, DISMISSED the Relator's Petition without opinion and without stating its reasoning therefor. This judgment entry is reproduced in section J. Appendix-VI, p. I. On or about February 6, 1991, the Relator filed a motion for a rehearing and/or for a new trial *or in the alternative* for an explanation as well as an affidavit. The relevant portions of this motion are reproduced at section J. Appendix-VIII, p. Q n.7. Finally, on or about February 27, 1991, the Supreme Court of Ohio DENIED the Relator's motion for a rehearing. This judgment entry is reproduced at section J. Appendix-VII, p. K.

The federal questions presented herein were not raised be-

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[1] In the Supreme Court of Ohio, original actions are tried upon the evidence presented by affidavit and the briefs pursuant to the Ohio Rules of Civil Procedure. Oral argument is discretionary with the Court, and in this Case, it was denied.

low, because it was impossible to raise them below. In regards to the first question presented, the absence of an appellate procedure tautologically precluded the raising of the issue, because there is no appellate jurisdiction to which it can be addressed. In regards to the second and third questions presented, they arose as a result of the final judgment of the Supreme Court of Ohio *acting as a trial court*, again from which there was no appeal. The general rule, of course, is that federal questions must be raised below in order to confer jurisdiction upon this Court. However, the exception to the rule is impossibility: it was impossible to raise these federal questions below. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986):

> The only exception appears in the rare situation where the highest state court, following a "surprise" decision wherein the federal issue is born, declines to entertain a petition for rehearing and the federal question can be raised in no other way than through the papers addressed to th[is] . . . Court.

id. at 157 (footnote omitted) (citing *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)); *cf. id.* at 143 (no need to seek *discretionary* rehearing in court of last resort in order to invoke the jurisdiction of this Court).

This concept of impossibility is discussed in more detail below in the Petitioner's discussion of his several denials of procedural due process.

I. THE REASONS FOR GRANTING THE WRIT

PURSUANT TO FED. R. SUP. CT. 10, the Petitioner, Richard G. Johnson, respectfully prays that a writ of certiorari issue to review, vacate, and remand (with disqualification and an order to create an appellate process), the judgment entry of dismissal by the Supreme Court of Ohio entered in this original action therein on or about January 30, 1991.

This Case presents important constitutional issues for this Court's review—all of which involve egregious denials of procedural due process. The first issue concerns the creation by the State of Ohio of a right to appeal the final judgments of the Supreme Court of Ohio a*cting as a trial court*, where the State of Ohio has failed to implement *any* mechanism to pursue that right of appeal. This Case presents the opportunity for this Court to explore the extent of procedural due process in the context of appeals. The second and third issues concern the interrelationship between the right to a fair and impartial trial and the Model Code of Judicial Conduct as adopted by the State of Ohio. This Court has historically applied the Code's standards when determining due process issues in this area, but it has not adopted the Code as *the* standard, primarily because the Code is of recent origin. This Case presents the opportunity for this Court to clarify and define the outer bounds of the procedural due process right to a fair and impartial trial by adopting the Model Code of Judicial Conduct as the standard of judicial behavior in that regard.

I. The Introduction—

- **Overview of Procedural Due Process and the applicability thereof to this Case—**

As a preliminary matter, the Petitioner must note that his original action commenced in the Supreme Court of Ohio was subject to the parameters of federal procedural due process. Specifically, "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend.

XIV, § 1.

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the [f]ourteenth [a]mendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.
>
> . . .
>
> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of of the interest at stake. We must look to see if the interest is within the [f]ourteenth [a]mendment's protection of liberty and property.
>
> . . .
>
> Certain attributes of "property" interests protected by procedural due process [have] emerge[d] . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [S/]He must have more than a unilateral expectation of it. [S/]He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 569-77 (1972) (footnotes and citations omitted); *see also Leis v. Flynt*, 439 U.S. 438, 441

(1979) (citation omitted) ("A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding.").

In light of the above discussion, it should come as no surprise that "a cause of action is a species of property protected by the [f]ourteenth [a]mendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Martinez v. California*, 444 U.S. 277, 281-2 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

> This conclusion is hardly a novel one. Th[is] Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. [F]or example—where a plaintiff's claim had been dismissed for failure to comply with a trial court's order—th[is] Court read the "property" component of the [f]ifth [a]mendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Similarly, the [f]ourteenth [a]mendment's Due Process Clause has been interpreted as preventing the [s]tates from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

Id. at 429-30 (citations and footnote omitted); *cf. id.* at 430 n.5 (discussing by analogy this Court's decisions on the right to access the courts in instances where fundamental rights are involved).[2]

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[2] As such, access to the courts may be seen at different times and in different contexts as both a facet of procedural due process (literal right to a hearing) and substantive due process and/or equal protection (prohibition on states from creating barriers of entry to the courts); in light of this, the Petitioner has framed the argument in subsection three, below, in terms of the third federal question of denial of procedural due process (access to courts), because the result is the denial of access to the court.

Finally, "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the [s]tate may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 432 (citations omitted). The test in regards to "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved.' These include the importance of the private interest and the length or finality of the deprivations, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Id.* at 434 (citations and footnote omitted).

II. **The Argument—**

1. **Every litigant in the State of Ohio has a statutory right of appeal in the first instance from the final order(s) of any trial court. The State of Ohio provides an appellate process for *every* such litigant except for litigants commencing original actions in the Supreme Court of Ohio—even though an appellate process therefrom is possible. The result of a lack of an appeal process is a *per se* violation of procedural due process for such litigants, because they are denied their right to an appellate hearing; moreover, the larger policy implication is that such litigants are denied any state forum to raise federal questions arising from such final orders of the Supreme Court of Ohio, which thus forces such litigants to raise these federal questions for the first time in this Court—**

The State of Ohio has vested in the Petitioner a right to appeal the final judgment of dismissal entered by the Supreme Court of Ohio in regards to this original action commenced therein. OHIO REV. CODE ANN. § 2505.03 (A) (Baldwin 1991) ("Every final order, judgment, or decree of a court . . . may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme

court, whichever has jurisdiction."). When the Supreme Court of Ohio dismissed the Relator's Petition, that judgment entry constituted a final appealable order. OHIO REV. CODE ANN. § 2505.02 (Baldwin 1991). In considering original actions filed therein, the Supreme Court of Ohio sits as a trial court and tries the case pursuant to the Ohio Rules of Civil Procedure. OHIO R. SUP. CT. PRAC. VIII, § 1. In light of the statutory right to appeal, the Petitioner had a due process right under Ohio law to have an appellate process provided for him. OHIO CONST. art. I, § 16 ("[E]very person . . . shall have remedy by due course of law, and shall have justice administered without denial or delay . . . .").

It is possible for the State of Ohio to create a review system beyond the present configuration of the Supreme Court of Ohio. The Ohio Constitution provides that "[t]he [S]upreme [C]ourt [of Ohio] shall, *until otherwise provided by law*, consist of seven judges . . . ." OHIO CONST. art IV, § 2 (A) (emphasis added). For an example, please see OHIO R. GOV. JUD. II (5) (when a motion to disqualify a justice of the Supreme Court of Ohio is presented, the entire court is disqualified, and it is replaced by the chief justice of the Court of Appeals of Ohio and the presiding judges of all twelve appellate judicial districts in Ohio). For instance, the General Assembly of Ohio could define the Supreme Court of Ohio, in the context of original actions, as consisting of a random subset of its current members, with an appellate procedure to the court *en banc*. However, the State of Ohio does not presently provide *any* appeal process from original actions brought in the Supreme Court of Ohio.

As a matter of federal procedural due process, the states are not constitutionally required to create an appellate process; however, when they do, due process applies to that appeal process. *Evitts v. Lucey*, 469 U.S. 387 (1985) (states are not constitutionally required to allow appeals as of right, but when they do, the requirements of due process apply); *State, ex rel. Heller, v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980) (requirements of due process apply to appeals as of right). It goes almost without saying that the hallmark of procedural due process is the right to a hearing.

Since the Petitioner has a due process right to an appellate hearing, and since the State of Ohio has not provided the Petitioner (or any other litigant in his position) *any* appellate procedure to exercise that right—the State of Ohio has denied to the Petitioner his right to procedural due process as guaranteed to him by the fourteenth amendment of the Constitution.

Applying the balancing test: the Petitioner's right in an appellate process is important, the deprivation is final, the chance of governmental error is present, and there are no apparent governmental interests to the contrary. In reality, this is a *per se* violation—there is nothing to balance.

The Petitioner does not assert that the statutory right to appeal, OHIO REV. CODE ANN. § 2505.03 (Baldwin 1991), is, itself, unconstitutional. Nothing requires that the substantive law include the procedural framework to carry out the law's purpose. The failure here is negative: the State of Ohio has failed to define, codify, and implement, a procedure to carry out the Petitioner's right to appeal in this situation.

The remedy for this violation is to remand this Case with an order to the State of Ohio to institute an appellate procedure for this situation.

Apart from the inequities placed upon the Petitioner, this situation has larger policy implications. Usually, when a federal question arises from the final judgment of a trial court, the aggrieved party can and must raise that federal question on appeal. In this instance, the State of Ohio provides no appellate process from the Supreme Court of Ohio in regards to original actions commenced therein; thus, the only way to raise such federal questions is in the first instance on petition for a writ of certiorari in this Court. That is hardly a system to be encouraged.

Finally, the Petitioner would note, tautologically, that there was no jurisdiction in Ohio to raise this federal question relevant herein, to wit: the issue of a lack of an appeal process only became an issue after the final judgment entry of the Supreme Court of Ohio

in this original action below, and the federal question raised thereby—by its very existence—precluded raising said federal question in the State of Ohio, because there is no state court to which the Petitioner can appeal.[3]

2. **The Petitioner has a substantive right under Ohio law to an impartial adjudication of his legally cognizable claims. The Petitioner has the same procedural due process right as guaranteed by the fourteenth amendment to the Constitution. All authorities agree that the judgment of a partial tribunal is void or voidable; however, what constitutes partiality has hardly begun to be fleshed out by the courts, and such reported cases usually deal with *ex ante* reasons for disqualification. This Case presents the issue of what to do with *ex post* reasons for disqualification; here, the partiality arose from the entirely bizarre and totally unfounded dismissal, *sua sponte*, by the Supreme Court of Ohio of the Petitioner's Case. Judicial ethics experts agree that this type of conduct represents disqualifiable partiality. As such, the Petitioner was denied his procedural due process right to a fair trial by the Supreme Court of Ohio—**

The State of Ohio has vested in the Petitioner, and in every other litigant, a right to an impartial tribunal by making the Ohio Code of Judicial Conduct binding upon the judiciary. OHIO R. GOV. BAR I (1). This right is, of course, enveloped by state procedural due process. OHIO CONST. art I, § 16. In Ohio, it is mandatory law that "[a] judge should respect and comply with the law and should conduct himself [or herself] at all times in a manner

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3 Obviously, a motion for rehearing cannot provide a forum to raise this issue, because the Supreme Court of Ohio does not have authority to create new appellate jurisdiction for itself, and because a motion for rehearing is "confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case." OHIO R. SUP. CT. PRAC. IX, § 1.

that promotes public confidence in the integrity and impartiality of the judiciary." OHIO CODE JUD. CONDUCT Canon 2 (A). In Ohio, it is mandatory law that a judge "should be unswayed by partisan interests," *id.* at Canon 3 (A) (1), and that s/he "should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law . . . ." *Id.* at Canon 3 (A) (4). In Ohio, even the appearance of impropriety supports disqualification. *Id.* at Canon 3 (C) (1); *Volodkevich v. Volodkevich*, 35 Ohio St. 3d 152, 518 N.E.2d 1208 (1988); *see generally* 22 OHIO JUR. 3D *Courts & Judges* §§ 112-23 (1980 & Supp. Jun. 1990) (discussing grounds for disqualification).

As a matter of federal procedural due process, it is written in stone that the Petitioner was entitled to a fair and impartial trial before the Supreme Court of Ohio. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927). Specifically, a "fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. at 136. A fair trial means that the judge is "require[d] to be impartial in weighing the evidence presented before him [or her] . . . ." *Id.* at 138. "Every procedure which would offer a possible temptation to the average [wo/]man as a judge to forget the burden of proof required . . . or which might lead him[/her] not to hold the balance nice, clear and true between . . . [the parties] denies . . . [them] due process of law." *Tumey*, 273 U.S. at 532.

In this Case, the impartiality arose and evidenced itself by and through the final judgment of the Supreme Court of Ohio, to wit: the Supreme Court of Ohio dismissed this Case, *sua sponte*, after considering it on the merits. *This was a trial court.* By analogy, it is as if the jury was recalled from deliberations by the judge and told to go home because s/he had dismissed the case. Plain error would seem too kind a description for such conduct. (Please note that the illegality of this conduct is discussed in subsection three, below.) And it is—this conduct goes far beyond plain error and constitutes disqualifying partiality, which is discussed below.

Commentators on judicial ethics agree that this type of intervention by the Supreme Court of Ohio on behalf of the Respondents destroyed the impartiality of the proceeding.

> Judges abuse the power of the judicial office when they abbreviate or change critical aspects of the adversary process in ways that run counter to the scheme established by relevant constitutional and statutory law. Litigants have a right to expect, for example, that their case will be heard . . . before an impartial judge . . . . When judges infringe on such basic rights accorded to litigants by our common law traditions, they run afoul of the Canon 3 (A) (1) command to be faithful to the law and the Canon 3 (A) (4) requirement that they accord to litigants full right to be heard according to law. . . .
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> . . .
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> [A] judge is unfaithful to the adversary process if he or she abandons the role of a neutral adjudicator and adopts the role of advocate.

J. SHAMAN, S. LUBET & J. ALFINI, JUDICIAL CONDUCT AND ETHICS 88, 89 (1990) (§ 4.06 Abuse of the Adversarial Process) (parentheses inserted); *see also id.* at 90-1 (§ 4.08 Coercing Case Dispositions) (noting that a unilateral dismissal can result in a violation of Cannon 3 (A) (4)); *see generally* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶¶ 61:2201-4 (1985) (Appearance of Impropriety).

Moreover, "favoritism toward one of the parties to a suit . . . constitute[s] disqualifying bias or prejudice." J. SHAMAN, S. LUBET & J. ALFINI at 105 (§ 5.04 Personal Bias or Prejudice) (citing *United States v. Carignan*, 600 F.2d 762 (9th Cir. 1979); *Evans v. Superior Ct.*, 107 Cal. App. 372, 290 P. 662 (1930)); *see generally* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶¶ 61:2301-06 (1985) (Adjudicative Responsibilities).

The test for an appearance of partiality is meant to be an

> objective one: whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial. This is objective in the sense that the standard is filtered through the eyes of a reasonable observer, rather than through the subjective view of the judge in question. However, although the test was meant to be objective, one court has noted that it is inherently subjective. That is because the appearance of partiality depends upon one's standard of observation, which will vary from individual to individual. In reality, there is no objective standard to determine the appearance of partiality, but it is clear that the appearance of partiality is to be decided from the viewpoint of a disinterested observer, and not from the subjective viewpoint of the judge in question.

J. SHAMAN, S. LUBET & J. ALFINI at 143-4 (§ 5.25 Other Instances of Disqualification) (footnotes omitted); *see generally* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶¶ 61:2501-8 (1985) (Disqualification).

Another commentator discussing the American tradition of judicial passivity, with the reactive model of the judge as an umpire, noted that "when the tradition is that a judge remains passive, the appearance of unusual judicial activity suggests that the judge is partial to the party aided by the judge's intervention . . . ." C. WOLFRAM, MODERN LEGAL ETHICS 1000 (1986) (§ 17.6 Passivity) (citing Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-5, 385-7 (1978) (discussing adjudication as a special type of social ordering and decision making, where it is vital for the arbiter to remain impartial; and discussing the rule that the arbiter should be passive in order to maintain the integrity of the proceedings—the arbiter should not initiate proceedings)); *see also id.* at 980-999 (§ 17.5 Independence and Neutrality).

There is absolutely no authority to support the Supreme Court of Ohio's dismissal, *sua sponte*, of the Petitioner's Case therein—after considering it on the merits. The Ohio Code of Judicial Conduct is to the contrary: the Petitioner had a procedural due

process right to a hearing on the merits. Applying the comments of the above-noted expert authorities, it seems too obvious that—for whatever reason—the Supreme Court of Ohio became partial in this Case below. In effect, what the Supreme Court of Ohio did was: (1) to make the Respondents' motions to dismiss for them, (2) to consider the motions out-of-rule (since they were time-precluded and waived), and (3) to accept its own "bright idea" by dismissing this Case. *If this is not* "the appearance of unusual judicial activity [which] suggests that the . . . [Supreme Court of Ohio] [wa]s partial to the . . . [Respondents] aided by . . . [its] intervention," C. WOLFRAM at 1000, *if this is not* "favoritism toward one of the [Respondents which] . . . constitute[s] disqualifying bias or prejudice," J. SHAMAN, S. LUBET & J. ALFINI at 105, *if this is not* a failure by the Supreme Court of Ohio "to hold the balance nice, clear and true between" the Parties, *Tumey*, 273 U.S. at 532, *then the Petitioner does not know what conduct would give rise to a claim of adverse partiality.*

Applying the balancing test: the Petitioner's right in an impartial adjudication on the merits is important, the deprivation is final, the chance of governmental error is present, and there are no apparent governmental interests to the contrary. In reality, this is a *per se* violation—there is nothing to balance.

The remedy is to vacate the judgment entry of dismissal entered by the Supreme Court of Ohio, to remand this Case for an impartial merit determination, and to disqualify the six (6) members of the Supreme Court of Ohio who became partial in this Case. *See Aetna Life Ins. Co.*, 475 U.S. at 827-8; *Ward*, 409 U.S. at 57, 60; *In re Murchison*, 349 U.S. at 137-9; *Tumey*, 273 U.S. at 522-35.[4]

Finally, the Petitioner must note that this federal question could not have been raised below, because—again—the State of Ohio has not provided an appellate procedure in this instance. Motions for disqualification or recusal are designed to prevent further corruption of the proceedings—they cannot be used to collaterally

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[4] Justice Brown, who did not participate below, would then become the acting chief justice and would appoint a replacement for each of the disqualified justices. OHIO CONST. art. IV, § 2 (A).

attack a final judgment.[5] In this Case, the grounds for disqualification did not appear until the entry of the final judgment of dismissal. In this instance—no matter what other procedural safeguards are provided by the State of Ohio, such as disqualification, "the [s]tate's trial court procedure [cannot] be deemed constitutionally acceptable simply because the [s]tate eventually offers . . . an impartial adjudication. [The] Petitioner [wa]s entitled to . . . neutral and detached judge[s] in the first instance." *Ward*, 409 U.S. at 61-2 (footnote omitted).

3. **The Supreme Court of Ohio considered this Case below on the merits; however, the Supreme Court of Ohio has refused to enter a judgment for or against the Petitioner. Instead, the Supreme Court of Ohio dismissed the Case below, and it has so far refused—in violation of Ohio law—to explain its reasons therefor. This conduct, *per se*, denied the Petitioner his procedural due process right of access to the courts as guaranteed by the fourteenth amendment to the Constitution—**

The State of Ohio has vested in the Petitioner the right to bring an original action in the Supreme Court of Ohio, OHIO CONST. arts. I, § 16 and IV, § 2 (B) (1) (b, e), and "[n]o law shall be passed or rule made whereby any person shall be prevented from

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5 In *Aetna Life Ins. Co.*, this Court glossed over a recusal motion made to the allegedly disqualifiable Alabama Supreme Court prior to a motion for rehearing as raising the federal question of denial of procedural due process. 475 U.S. at 819-20. However, recusal offers no right to the movant—it is merely a request to the judicial officer to disqualify himself. It is simply absurd to think that a litigant must go through the futile exercise of recusal in order to raise a federal question—especially since recusal involves a judge judging his own case—which has already been held to violate procedural due process. *Aetna Life Ins. Co.*, 475 U.S. at 824; *In re Murchison*, 349 U.S. at 136. Or to put it another way, utilization of the recusal process, which itself violates procedural due process, cannot be held to be a valid and necessary prerequisite in order to raise the federal question of a denial of a fair trial or hearing in the court of last resort. This Court has never so held, and this Court should clarify its position in *Aetna* that said recusal motion was not a prerequisite to this Court's jurisdiction of that federal question.

invoking the original jurisdiction of the [S]upreme [C]ourt [of Ohio]." OHIO CONST. art. IV, § 2 (B) (3). Under Ohio law, this right can be characterized as a substantive right to access the courts in regards to mandamus and procedendo proceedings.

As has been noted in the introductory section, above, federal procedural due process applies to this state right, and federal procedural due process, *itself*, creates or guarantees a complementary right to access the courts. The cornerstone of access to the courts is the right to a merit determination—unless such a determination can be validly cut off by accepted court rules. *Logan*, 455 U.S. at 437. To repeat, the doctrine of procedural due process places "'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits . . . .'" *Id.* at 429 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)) (applying the fifth amendment). "*Similarly, the [f]ourteenth [a]mendment's Due Process Clause has been interpreted as preventing the [s]tates from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].*'" *Id.* at 429-30 (emphasis added) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Finally, as discussed in subsection two, above, there is a federal procedural due process right to a fair trial—a component of which is that the tribunal is required to follow the mandatory law of the jurisdiction.

The Petitioner was denied his right to access the Supreme Court of Ohio in two ways: first, by the Supreme Court of Ohio's refusal to enter judgment for or against the Petitioner in this original action after hearing it on the merits; and, second, by the Supreme Court of Ohio's refusal to issue findings of facts and conclusions of law as demanded by the Petitioner and/or its refusal to render and publish an opinion as required by the Ohio Constitution.

Since the Supreme Court of Ohio did not render any opinion or explanation for its dismissal of this Case below, it becomes necessary to examine what "dismissal" means under Ohio law.

First, the Supreme Court of Ohio's judgment entry of dismissal was considered, *sua sponte*. The only *sua sponte* motion to dismiss that a trial court can consider is one for lack of subject matter jurisdiction. OHIO R. CIV. P. 12 (H) (3); *see Fox v. Eaton Corp.*, 48 Ohio St. 2d 236, 238, 358 N.E.2d 536, 537 (1976) (court has inherent power to dismiss, *sua sponte*, for lack of subject matter jurisdiction at any stage in the proceedings). Since the Supreme Court of Ohio has original jurisdiction in mandamus and procedendo cases, OHIO CONST. art. IV, § 2 (B) (1) (b, e), it could not have dismissed this Case on that basis. Moreover, and as discussed in subsection two, above, courts are prohibited by the procedural due process right to a fair and impartial tribunal from taking *any* further actions, *sua sponte*.

Second, the Supreme Court of Ohio had already heard and DENIED motions to dismiss and motions for summary judgment in this Case. Those motions in this Case below were premised upon a "failure to state a claim upon which relief can be granted." OHIO R. CIV. P. 12 (B) (6); 56 (B, C) (context of potentially convertible Civil Rule 12 (B) (6) motion). The purpose of such a motion to dismiss is only to test the sufficiency of the complaint and such a motion cannot be used to extinguish the trial on the merits. *E.g., Slife v. Kundtz Properties, Inc.*, 40 Ohio App. 2d 179, 318 N.E.2d 557 (Cuyahoga 1974). The Supreme Court of Ohio has recently reiterated this standard that

> [u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. In order for a judge to grant a motion to dismiss for failure to state a claim, it must appear "'beyond doubt that the plaintiff can prove no set of facts in support of his[/her] claim which would entitle him[/her] to relief.'"

Byrd v. Faber, 57 Ohio St. 3d 56, 60, 565 N.E.2d 584, 589 (1991) (citations omitted).

The Supreme Court of Ohio went on to note that "[w]hile there is

no question regarding this standard, there is considerable debate about how much specificity is required in order for a plaintiff to survive a motion to dismiss." *Id.*; *see also State, ex. rel Baran, v. Fuerst*, 55 Ohio St. 3d 94, 563 N.E.2d 713 (1990) (court cannot dismiss a complaint for failure to state a cause of action when the complaint states a cause of action and the court implicitly determines the merits).

The Petitioner submits that it is legally impossible for his Petition to have been held to state a cause of action, to have been held to present reasonable issues as to the material facts in question, and then *almost one year later* for the Petition to be held not to state a cause of action after the Supreme Court of Ohio had considered this Case on the merits.[6] Moreover, since this Case had been set for trial (by virtue of the establishment of the briefing schedule) by the Supreme Court of Ohio, motions to dismiss or for summary judgment were further procedurally barred. *See* OHIO R. CIV. P. 56 (B) (after case has been set for trial, motions for summary judgment can only be asserted by leave of court).

Third, as a matter of elimination, then, it is beyond reasonable contention that the Supreme Court of Ohio, *sub silentio*, dismissed this Case below "pursuant" to Civil Rule 41 (B) (2). *See State, ex rel Kopchak, v. Lime*, 44 Ohio St. 2d 3, 335 N.E.2d 700 (1975). In fact, the Supreme Court of Ohio has previously held that when

> [t]he issues were fully argued and *briefed* before the [c]ourt of [a]ppeals [in regards to an original action commenced therein], that court's dismissal of the relator's complaint went to the substance of the controversy. Its

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6 In Ohio, to state a cause of action in mandamus against the judiciary, all a relator need plead is operative facts supporting a claim that: (1) s/he has a right to certain legal relief, (2) the respondent is under a legal/ministerial duty to grant that relief but has refused, and (3) s/he has no adequate remedy at law under the unique circumstances of the case or that the remedy is irrelevant in light of the Supreme Court of Ohio's supervisory jurisdiction over lower courts. *E.g.*, State, ex rel. Connor, v. McGough, 46 Ohio St. 3d 188, 546 N.E.2d 407 (1989); *see generally* 67 OHIO JUR. 3D *Mandamus, Procedendo, and Prohibition* §§ 1-162 (1986 & Supp. Jun. 1990).

> dismissal of the complaint and denial of the writ, without any qualifying language in its order, constitute[d] an adjudication on the merits.

Id. at 4, 335 N.E.2d at 701 (emphasis added) (citing OHIO R. CIV. P 41 (B) (2)).

There is simply no such thing as a *judgment* of dismissal on the merits—the only way to terminate a case on the merits is by entering judgment for one of the parties. *See generally* 2 J. KLEIN, J. BROWNE & J. MURTAUGH, BALDWIN'S OHIO CIVIL PRACTICE *Text* § 37.06 (B) (1990) (if a motion to dismiss is granted on the merits, a judgment is entered in favor of the defendant).

Since this was a bench trial below, pursuant to Civil Rule 41 (B) (2), the Respondents could have moved to dismiss the Petition after the Petitioner's Presentation of Evidence. OHIO R. CIV. P. 41 (B) (2). Such a motion is the equivalent to a motion for a directed verdict in the context of a jury trial. OHIO R. CIV. P. 50 (A); *Allstate Ins. Co. v. Humphrey (In re Humphrey)*, 102 Bankr. 629, 633 (S.D. Ohio 1989); *Jackson v. Gossard*, 48 Ohio App. 3d 309, 311-2, 549 N.E.2d 1234, 1236-7 (Allen 1989); *National City Bank v. Fleming*, 2 Ohio App. 3d 50, 55 440 N.E.2d 590, 596-7 (Cuyahoga 1981); *cf.* OHIO R. CIV. P. ANN. 41 (B) (2) (Baldwin 1991) (1970 Rules Advisory Committee Staff Notes);

> [Civil] Rule 41 (B) (2), governing dismissal of plaintiff's claim at the conclusion of plaintiff's evidence in a non-jury-action, is somewhat akin to a motion for a directed verdict in a jury action. The rule, however, is not governed by the standards which control the granting of a directed verdict. . . . If the motion is granted, the court may be requested by either party to set forth the court's finding of facts and law in conformity with Rule 52. If the motion is overruled, the trial continues to conclusion, the defendant being required to present his evidence.

id.; *see generally* 2 J. KLEIN, J. BROWNE & J. MURTAUGH at

Text § 37.02. Civil Rule 41 (B) (2) is similar to Civil Rule 12 (B) (6) in that it attacks the pleadings; the difference is that the latter attacks the statements of the complaint while the former attacks the proof at trial of the complaint. The question is still whether or not the plaintiff has asserted his *prima facie* case. *Jackson v. Gossard*, 48 Ohio App. 3d at 311-2, 549 N.E.2d at 1236-7; *National City Bank*, 2 Ohio App. 3d at 55, 440 N.E.2d at 596-7; *Janell, Inc. v. Woods*, 70 Ohio App. 2d 216, 216-7, 435 N.E.2d 1138, 1139 (Hamilton 1980); *Central Motors Corp. v. City of Pepper Pike*, 63 Ohio App. 2d 34, 48-9, 409 N.E.2d 258, 270-1 (Cuyahoga 1979); *see generally* 1 & 2 J. KLEIN, J. BROWNE & J. MURTAUGH at §§ 25.03 (B) (2) and 37.05. As such, a Civil Rule 41 (B) (2) motion only serves to preempt the necessity of the presentation of evidence by the defendant/respondent and to accelerate the final disposition—it does not abridge a final determination on the merits. *E.g.*, *Central Motors Corp.*, 63 Ohio App. 2d at 48-9, 409 N.E.2d at 270-1. Finally, once the defendant/respondent has presented its evidence, the right to the motion is waived. *Allstate Ins. Co.*, 102 Bankr. at 633 (citation omitted) ("Defendant waived his motion and the right to challenge its disposition when he proceeded to introduce evidence on his behalf."); *National City Bank*, 2 Ohio App. 3d at 55, 440 N.E.2d at 596-7; *see generally* 2 J. KLEIN, J. BROWNE & J. MURTAUGH at § 37.06 (A) (2) (b).

In summary, a review of Civil Rule 41 (B) (2) reveals: (1) that the motion cannot be asserted *sua sponte*, (2) that the motion does not result in a judgment of dismissal but rather a judgment against the plaintiff/relator on the merits, and (3) that once the defendant/respondent has presented its evidence, the right to the motion is waived. Thus, the Supreme Court of Ohio could not have legally dismissed this Case on the basis of Civil Rule 41. None of this is a surprise. In fact, it is nothing more than freshman civil procedure. And the Supreme Court of Ohio *knows* that

> [b]y its terms, the rule [Civil Rule 41 (B) (2)] limits the motion to the ground that . . . [the movant] 'has shown no right to relief" and limits [thei]r response to rendering or declining to render "judgment" against the . . . [movant]. [Th]e[y] [have] defined "judgment" as "the final determi-

> nation of a court of competent jurisdiction of matters submitted to it."

In re Election of November 6, 1990 for the Office of Attorney General of Ohio, 58 Ohio St. 3d 604, 604, 567 N.E.2d 984, 984 (1991) (citations omitted) (holding that the rule is not applicable to partial motions to dismiss and noting that the proper procedure for such partial dismissals is Civil Rule 56); *accord Allstate Ins. Co.*, 102 Bankr. at 633 (citation omitted) ("[A] denial of the motion means nothing more than a refusal to enter judgment at that time.").

Assuming, *arguendo*, that the Supreme Court of Ohio could *sua sponte* dismiss this Case below, it was still obligated to justify its action, because it was required to report a decision explaining its reasoning, OHIO CONST. art. IV, § 2 (C), and, alternatively, because the Petitioner made a timely demand for findings of fact and conclusions of law. OHIO R. CIV. P. 41 (B) (2) and 52. Of course, th[e]se rules "confer[] a substantial right on the [P]arties and impose a mandatory duty on the trial court. Refusal to comply with a proper request under Civ[il] R[ule] 41 (B) (2) constitutes prejudicial error. . . . Failure to comply with Civ[il] R[ule] 41 precludes . . . [a reviewing court] from reaching the remaining assignments of error." *Hinton v. Dillon Co.*, No. 11586 (LEXIS, Ohio library, Appellate file) (Summit Jul. 18, 1984) (reproduced below at section J. Appendix-IX., pp. V-Y).

The bottom line is that the Petitioner was denied his right to a merit hearing on his cause of action against the Respondents and he was denied his right to an explanation of the final judgment entry of dismissal by the Supreme Court of Ohio. For whatever indefensible reason, the Supreme Court of Ohio does not want the Petitioner—*or the public*—to know why he should not prevail on the merits. Thus, the Petitioner was denied his right to procedural due process.

Applying the balancing test: the Petitioner's right in an adjudication on the merits—and explanation thereof—is important, the deprivation is final, the chance of governmental error is present, and there are no apparent governmental interests to the contrary. In real-

ity, this is a *per se* violation—there is nothing to balance.

The remedy is to vacate the Supreme Court of Ohio's judgment entry of dismissal and to remand this Case for a determination on the merits with an order to the Supreme Court of Ohio to explain any resulting judgment.

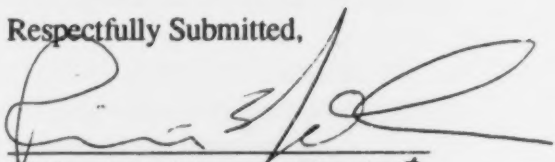
Finally, and again due to the lack of an appeal process, the Petitioner was denied any opportunity to raise this federal question below, since the procedural due process violation occurred as a result of the final judgment entry of dismissal, or, alternatively, from the denial of the Petitioner's motion for rehearing and/or a new trial *or in the alternative* for an explanation.

III. The Conclusion—

As has been demonstrated above, the Petitioner had a right to appeal the judgment entry of dismissal by the Supreme Court of Ohio, but the State of Ohio has provided no such avenue. He had a right to an impartial adjudication in the first instance before the Supreme Court of Ohio, but instead he got a partial tribunal that *sua sponte* dismissed his Case after considering it on the merits. Finally, he had a right to have his cause of action decided on the merits with an explanation for any rendered judgment, but instead he received a silent kick out the courthouse door. Every right claimed by the Petitioner is protected by the fourteenth amendment's guarantee of procedural due process. It is all too plain that the Petitioner has been denied his right to procedural due process.

FOR ALL OF the foregoing reasons, this Court should issue a writ of certiorari to review, vacate, and remand (with disqualification and an order to create an appellate process), the judgment entry of dismissal by the Supreme Court of Ohio entered in this original action therein on or about January 30, 1991.

Respectfully Submitted,



Richard G. Johnson, Esquire[*]
Counsel Pro Se of Record
11477 Mayfield Road, Suite 814
Cleveland, Ohio 44106-5906
216/229-6777 *telephone*
216/229-1447 *facsimile*

Petitioner Pro Se

Dated: May 20, 1991

[*] The Petitioner is an attorney-and-counselor-at-law admitted to, and in good standing with, the Bar of the State of Ohio and the United States District Court for the Northern District of Ohio. He practices law as Richard G. Johnson Co., L.P.A.

Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1990

The State of OHIO, EX REL. Richard G. JOHNSON, Esquire,

Petitioner,

-vs-

The Honorable Terrence O'DONNELL, Judge,

Prudential-Bache Securities, Inc.,

-and-

Jay H. Salamon, Esquire,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

Petition for a Writ of Certiorari

•**Richard G. Johnson, Esquire,** *Counsel Pro Se of Record,* 11477 Mayfield Road, Suite 814, Cleveland, Ohio 44106-5906, 216/229-6777 *telephone,* 216/229-1447 *facsimile, Petitioner Pro Se.*

Dated: May 20, 1991

J. THE APPENDIX

I. The Judgment Entry of December 12, 1989—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

December 12, 1989

In Mandamus and Procedendo

Motion Entry

Unreported.

On written request of counsel for relator it is ordered that the time for filing opposition to motion to dismiss is hereby extended to January 16, 1990.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

II. The Judgment Entries of February 14, 1991—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

February 14, 1990

In Mandamus and Procedendo

Motion Entry

49 Ohio St. 3d 704, 551 N.E.2d 615 (1990).

This cause originated in this Court on the filing of a complaint for writs of mandamus and procedendo.

Upon consideration of the motion of Prudential-Bache Securities, Inc. and Jay H. Salamon to intervene in the mandamus action,

IT IS ORDERED by the Court that said motion to intervene be, and the same is hereby, granted.

Upon consideration of the motion of intervening respondents, Prudential-Bache Securities, Inc. and Jay H. Salamon, to dismiss, or in the alternative for summary judgment, and motion for sanctions,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, overruled and summary judgment is denied to either party.

IT IS FURTHER ORDERED by the Court that said motion for sanctions be, and the same is hereby, denied.

Upon consideration of relator's motion for sanctions,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

Upon consideration of relator's motion to strike,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

Upon consideration of relator's motion to stay the trial court proceedings,

IT IS ORDERED by the Court that said motion be, and the same is hereby, granted.

Upon consideration of the relator's motion for a default judgment and request for oral argument,

IT IS ORDERED by the Court that said motion and request be, and the same are hereby, denied.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

WRIGHT, J., would grant the motion to dismiss and grant the motion for leave to intervene, but would deny the motion for sanctions.

RESNICK, J., would grant the motion to dismiss, grant the motion for sanctions, deny the motion for stay, and deny the request for oral argument.

III. The Judgment Entry of March 9, 1990—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

March 9, 1990

In Mandamus and Procedendo

Motion Entry

Unreported.

On written request of relator for an extension of time to file a response to any motions, brief, or other Court filings, which may be filed in his absence, it is ordered by the Court that such request be, and hereby is, denied.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

IV. The Judgment Entry of May 17, 1990—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

May 17, 1990

In Mandamus and Procedendo

Motion Entry *Nunc Pro Tunc*

Unreported.

This cause originated in this Court on the filing of a complaint for writs of mandamus and procedendo.

Upon consideration of respondent's motion to dismiss and motion for sanctions,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, overruled, effective February 14, 1990.

IT IS FURTHER ORDERED by the Court that said motion for sanctions be, and the same is hereby, denied, effective February 14, 1990.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

V. The Judgment Entry of August 15, 1990—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

August, 15, 1990

In Mandamus and Procedendo

Motion Entry

53 Ohio St. 3d 709, 559 N.E.2d 1366 (1990).

This cause originated in this Court on the filing of a complaint for writs of mandamus and procedendo.

Upon consideration of relator's motion to strike respondent's answer, relator's second motion against the respondent for a default judgment, or in the first alternative, a judgment on the pleadings, or in the second alternative, a summary judgment, or in the third alternative, a directed verdict,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

Upon consideration of intervening respondents' motions to file answer instanter and for establishment of briefing schedule,

IT IS ORDERED by the Court that said motions be, and the same are hereby, granted.

IT IS FURTHER ORDERED by the Court that relator file his brief on or before August 30, 1990; respondents file their briefs on or before September 14, 1990; and relator file his reply brief on

or before September 19, 1990.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

VI. The Judgment Entry of January 30, 1991—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

January 30, 1991

In Mandamus and Procedendo

Judgment Entry

57 Ohio St. 3d 712, ___ N.E.2d ___ (1991).

This cause originated in this Court on the filing of a complaint for writs of mandamus and procedendo and was considered in a manner prescribed by law.

Upon consideration thereof,

IT IS ORDERED by the Court, *sua sponte*, that this cause be, and the same is hereby, dismissed.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

MOYER, C.J., SWEENEY, WRIGHT and RESNICK, JJ., concur.

DOUGLAS, J., would dismiss but would have the Court consider its own sanctions.

HOLMES, J., would deny the writ.

H. BROWN, J., not participating.

VII. The Judgment Entry of February 27, 1991—

IN THE SUPREME COURT OF OHIO

The State of Ohio, ex rel. Richard G. Johnson, Relator,
v.
Terrence O'Donnell, Judge, Respondent

Case No. 89-1921

February 27, 1991

In Mandamus and Procedendo

Rehearing Entry

58 Ohio St. 3d 704, ___ N.E.2d ___ (1991).

This cause came on for further consideration upon relator's motion for rehearing and/or for a new trial or in the alternative for an explanation.

Upon consideration thereof,

IT IS ORDERED by the Court that said motion be, and the same is hereby, denied.

/s/ THOMAS J. MOYER

CHIEF JUSTICE

H. BROWN, J., not participating.

VIII. The Procedure on Original Action in the Supreme Court of Ohio—

On or about November 13, 1989, the relator, Richard G. Johnson ("Relator"), filed a two-count Petition for Peremptory Writs of Mandamus and Procedendo in the First Instance or Writs and Alternate Writs of Mandamus and Procedendo ("Petition") against the respondent, Judge Terrence O'Donnell ("Respondent" or "Judge O'Donnell"), in the Supreme Court of Ohio.

In Count One of that Petition, the Relator "pray[ed] for [the Supreme Court of Ohio] to issue Peremptory Writs of Mandamus and Procedendo in the First Instance requiring Judge O'Donnell to enter default judg[]ments, or judgments on the pleadings, against Shearson [Lehman Hutton, Inc.] and Prudential-Bache [Securities, Inc.], and requiring Judge O'Donnell to liquidate those judgments in a reasonably timely and efficient manner. In the alternative, the Relator pray[ed] for [the Supreme Court of Ohio] to issue Alternate Writs of Mandamus and Procedendo ordering Judge O'Donnell to show cause why Writs of Mandamus and Procedendo should not issue in this case." Relator's Petition, at 10.

In Count Two of that Petition, the Relator "pray[ed] for [the Supreme Court of Ohio] to issue a Peremptory Writ of Mandamus in the First Instance requiring Judge O'Donnell to refer Prudential-Bache [Securities, Inc.]'s counsel, [Jay H.] Salamon, to the disciplinary process for his unethical conduct. In the alternative, the Relator pray[ed] for [the Supreme Court of Ohio] to issue an Alternate Writ of Mandamus ordering Judge O'Donnell to show cause why a Writ of Mandamus should not issue in this case." Relator's Petition, at 10.

On or about or about November 17, 1989, one of the Defendants below, Prudential-Bache Securities, Inc. ("Prudential-Bache"), and Jay H. Salamon ("Salamon") (collectively "Intervening Respondents") filed a Motion to Intervene in the mandamus Action. Salamon is one of Prudential-Bache's counsels of record below and in the Supreme Court of Ohio. In addition, the In-

tervening Respondents filed a Motion to Dismiss the Relator's Petition for Peremptory Writs of Mandamus and Procedendo, or in the alternative, for Summary Judgment, and a Motion for Frivolous Conduct Sanctions against the Relator. On the same date, the Intervening Respondents filed a Brief in Support of the aforesaid Motions.

On or about November 28, 1989, the Relator filed a Brief in Opposition to the Intervening Respondents' Motion to Intervene.

On or about or about December 4, 1989, the Intervening Respondents filed a Reply to the Relator's Brief in Opposition.

On or about December 7, 1989, the Relator filed a Response in Opposition to the Intervening Respondents' Reply.

On or about or about December 7, 1989, the Respondent filed a Motion to Dismiss the Relator's Petition as well as a Motion for Sanctions against the Relator.

On or about December 12, 1989, the Relator filed a Motion for an Extension of Time until January 15, 1990, in which to file his brief in opposition to the Respondent's Motion to Dismiss and his Motion for Sanctions.

On or about December 12, 1989, the Supreme Court of Ohio GRANTED the Relator's Motion for an Extension of Time until January 16, 1990, *sua sponte*.

On or about December 12, 1989, the Relator filed a Motion for Frivolous Conduct Sanctions against the Respondent and his Attorneys.

On or about December 19, 1989, the Relator filed a Motion to Stay the Trial Court Proceedings.

On or about December 20, 1989, the Intervening Respondents filed a Brief in Opposition to the Relator's Motion to Stay.

On or about December 28, 1989, the Relator filed a Reply

to the Intervening Respondents' Brief in Opposition to the Relator's Motion to Stay the Trial Court Proceedings as well as a Motion to Strike the Respondent's Motion for Sanctions against the Relator.

On or about January 17, 1990, the Relator filed a Request for Oral Argument, a Response in Opposition to the Respondent's Motion to Dismiss, a Response in Opposition to the Respondent's Motion for Sanctions, a Motion for a Default Judgment, and a Brief in Support of his Petition and other Matters.

On or about January 23, 1990, the Respondent filed a Brief in Opposition to the Relator's Motion for a Default Judgment.

On or about January 30, 1990, the Relator filed a Reply to the Respondent's Brief in Opposition to the Relator's Motion for a Default Judgment.

On or about February 14, 1990, the Supreme Court of Ohio GRANTED the Intervening Respondents' Motion to Intervene, but then DENIED their Motions to Dismiss or for Summary Judgment as well as their Motion for Sanctions. The Supreme Court of Ohio DENIED the Relator's Request for Oral Argument. The Supreme Court of Ohio also DENIED the Relator's Motion to Strike the Respondent's Motion for Sanctions as well as the Relator's Motion for Sanctions against the Respondent. In addition, the Supreme Court of Ohio DENIED the Relator's Motion for a Default Judgment against the Respondent. However, the Supreme Court of Ohio GRANTED the Relator's Motion to Stay the Trial Court Proceedings. These Judgment Entries are reported at 49 Ohio St. 3d 704, 551 N.E.2d 615 (1990).

On or about February 26, 1990, the Relator filed a Notice of Shearson Lehman Hutton, Inc.'s ("Shearson") Attempt to Circumvent the Supreme Court of Ohio's Judgment Entry of February 14, 1990, which Stayed the Trial Court Proceedings.

On or about March 9, 1990, the Relator filed a Notice of his Absence from the Venue and a Conditional Request for an Extension of Time.

On or about March 9, 1990, the Supreme Court of Ohio DENIED the Relator's Conditional Request for an Extension of Time.

On or about March 13, 1990, the Intervening Respondents filed a Presentation of Evidence.

On or about March 20, 1990, the Intervening Respondents filed an Agreed Amendment of their Presentation of Evidence.

On or about March 27, 1990, the Relator filed a Motion for Default Judgments or Judgments on the Pleadings against the Intervening Respondents, a Notice of the Evidence Presented, an Objection to the Intervening Respondent's "Net" Evidence, and an Amendment of his "Gross" Evidence.

On or about March 28, 1990, the Intervening Respondents filed a Motion for Leave to File a Responsive Pleading Instanter as well as their Answer.

On or about March 30, 1990, the Relator filed a Response in Opposition to the Intervening Respondents' Motion for Leave to File a Responsive Pleading Instanter.

On or about May 17, 1990, the Supreme Court of Ohio DENIED the Respondent's Motion to Dismiss the Relator's Petition and his Motion for Sanctions against the Relator, by a judgment entry *nunc pro tunc* effective February 14, 1990.

On or about May 31, 1990, the Respondent filed an Answer to the Relator's Petition.

On or about June 5, 1990, the Relator filed a Motion to Strike the Respondent's Answer, a Second Motion against the Respondent for a Default Judgment *or in the First Alternative* a Judgment on the Pleadings *or in the Second Alternative* a Summary Judgment *or in the Third Alternative* a Directed Verdict, and a Correction of his Amended Presentation of Evidence.

On or about June 6, 1990, the Intervening Respondents

filed a Motion for the Establishment of a Briefing Schedule in this Case.

On or about June 11, 1990, the Relator filed a Reply to the Intervening Respondents' Motion for the Establishment of a Briefing Schedule.

On or about August 15, 1990, the Supreme Court of Ohio DENIED the Relator's Motion to Strike the Respondent's Answer, his Second Motion against the Respondent for a Default Judgment, or in the First Alternative a Judgment on the Pleadings, or in the Second Alternative a Summary Judgment, or in the Third Alternative a Directed Verdict. On the same date, the Supreme Court of Ohio GRANTED the Intervening Respondents' Motions for Leave to File a Responsive Pleading Instanter and to Establish a Briefing Schedule; the Supreme Court of Ohio ORDERED the Relator to file his Merit Brief on or before August 30, 1990; the Supreme Court of Ohio ORDERED the Respondents to file their Opposition Briefs on or before September 14, 1990; and the Supreme Court of Ohio ORDERED the Relator to file his Reply Brief on or before September 19, 1990. These Judgment Entries are reported at 53 Ohio St. 3d 709, 559 N.E.2d 1366 (1990).

On or about August 30, 1990, the Relator filed his Merit Brief.

On or about September 11, 1990, the Respondent filed his Brief in Opposition to the Relator's Merit Brief.

On or about September 13, 1990, the Intervening Respondent, Salamon, filed his separate Brief in Opposition to the Relator's Merit Brief.

On or about September 13, 1990, the Intervening Respondent, Prudential-Bache, filed its separate Brief in Opposition to the Relator's Merit Brief.

On or about September 19, 1990, the Relator filed his Reply Brief.

On or about January 30, 1991, the Supreme Court of Ohio, *sua sponte*, DISMISSED the Relator's Petition without opinion and without stating its reasoning therefor. This Judgment Entry is reported at 57 Ohio St. 3d 712, ___ N.E.2d ___ (1991).

On or about February 6, 1991, the Relator filed a Motion for a Rehearing and/or for a New Trial *or in the Alternative* for an Explanation as well as an Affidavit.[7]

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7 In that Motion, the Relator stated in part as follows:

As this Court knows, this Case is governed by this Court's Rules of Practice and by the Rules of Civil Procedure. OHIO R. SUP. CT. PRAC. VIII. §§ 1 *et seq.*, IX.

Pursuant to OHIO R. SUP. CT. PRAC. IX. § 1, the Relator respectfully moves this Court to: (1) rehear its Judgment Entry dismissing this Case, to (2) vacate that Judgment Entry, and to (3) reinstate this Case on this Court's Merit Docket with scheduled oral argument. In the conjunctive or alternative, and pursuant to OHIO R. CIV. P. 59 (A) (grounds for new trial) (1) ("abuse of discretion") and (9) ("[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application"), the Relator respectfully moves this Court for a new bench trial of this Case. Specifically, the Relator submits that this Court's Judgment Entry was the product of mistake or accident, and that it was/is erroneous as a matter of law.

In the alternative, and pursuant to OHIO CONST. art. IV, § 2 (C) ("The decisions in all cases in th[is] . . . [C]ourt shall be reported, together with the reasons therefor."); and OHIO R. CIV. P. 41 (B) (2) (if court dismisses an action on the merits, it must make findings of facts and conclusions of law if requested by a party) and 52 (court must make findings of facts and conclusions of law when requested by a party in the context of a bench trial), the Relator respectfully moves this Court to explain the reasons supporting its Judgment Entry.

The reasons for granting this Motion are more fully set forth below and in the attached Affidavit of Richard G. Johnson, which is incorporated herein by reference.

First, "[t]he decisions in all cases in th[is] . . . [C]ourt shall be reported, together with the reasons therefor." OHIO CONST. art. IV, § 2 (C). Since this Court did not offer any reasons supporting its Judgement Entry of dismissal, the Relator is ignorant as to what basis to argue for rehearing. He is left to guess.

Second, this Court's Judgment Entry of dismissal was considered *sua sponte*. The only *sua sponte* motion to dismiss that a trial court can consider is one for lack of subject matter jurisdiction. OHIO R. CIV. P. 12 (H) (3). Since this Court has original jurisdiction in mandamus and procedendo cases, OHIO CONST. art. IV, § 2 (B) (1) (b, e), this Court

could not have dismissed this Case on that basis.

Third, this Court has already heard and denied Motions to Dismiss and Motions for Summary Judgment in this Case, as set-out above. Those Motions were premised upon a "failure to state a claim upon which relief can be granted." OHIO R. CIV. P. 12 (B) (6). As this Court knows, the purpose of such a motion to dismiss is only to test the sufficiency of the complaint and that such a motion cannot be used to extinguish the trial on the merits. *E.g., Slife v. Kundtz Properties, Inc.*, 40 Ohio App. 2d 179, 318 N.E.2d 557 (Cuyahoga 1974) (Paragraph One of the Syllabus). Just three weeks ago, this Court reiterated this standard that

> [u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. In order for a judge to grant a motion to dismiss for failure to state a claim, it must appear "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

Byrd v. Faber, 57 Ohio St. 3d 56, 60, ___ N.E.2d ___, ___ (1991) (Resnick, J.) (citations omitted) (This Court went on to note that "[w]hile there is no question regarding this standard, there is considerable debate about how much specificity is required in order for a plaintiff to survive a motion to dismiss." *Id.*); *see also State, ex. rel Baran, v. Fuerst*, 55 Ohio St. 3d 94, 563 N.E.2d 713 (1990) (Per Curiam) (court cannot dismiss a complaint for failure to state a cause of action when the complaint states a cause of action and the court implicitly determines the merits).

The Relator submits that it is legally impossible for his Complaint to have been held to state a cause of action, to have been held to present reasonable issues as to the material facts in question, and then almost one year later for the Complaint to be held not to state a cause of action after this Court considered this Case on the merits.

Fourth, there is simply no such thing as a dismissal on the merits—the only way to terminate a case on the merits is by entering judgment for one of the parties. *See generally* 2 J. KLEIN, J. BROWNE & J. MURTAUGH, BALDWIN'S OHIO CIVIL PRACTICE *Text* § 37.06 (B) (1990) (if a motion to dismiss is granted on the merits, a judgment is entered in favor of the defendant). Since this is a bench trial, under Civil Rule 41 (B) (2), the Respondents could have moved to dismiss the Relator's Petition after the Relator's Presentation of Evidence. OHIO R. CIV. P. 41 (B) (2). Such a motion is the equivalent to a motion for a directed verdict in the context of a jury trial. *See* OHIO R. CIV. P. 50 (A); *see generally* 2 J. KLEIN, J. BROWNE & J. MURTAUGH, at *Text* § 37.02. The rule is similar to Civil Rule 12 (B) (6) in that it attacks the pleadings; the difference is that the latter attacks the statements of the complaint while the former at-

tacks the proof at trial of the complaint. *See generally id.*, at vols. 1 & 2 §§ 25.03 (B) (2) and 37.05. As such, the motion only serves to preempt the necessity of the presentation of evidence by the defendant/respondent and to accelerate the final disposition—it does not abridge a final determination on the merits. Moreover, once the defendant/respondent has presented its evidence, the right to the motion is waived. *See generally id.*, at vol. 2 § 37.06 (A) (2) (b). In conclusion, a review of Civil Rule 41 (B) (2) reveals: (1) that the motion cannot be asserted *sua sponte*, (2) that the motion does not result in a judgment of dismissal but rather a judgment against the plaintiff/relator on the merits, and (3) that once the defendant/respondent has presented its evidence, the right to the motion is waived. Thus, this Court could not have legally dismissed this Case on the basis of Civil Rule 41.

Finally, this Court has apparently declined to exercise its original jurisdiction by dismissing this Case on the merits rather than issuing a judgment. This would seem to deny the Relator his constitutional right of access to this Court and due process. OHIO CONST. art. I, § 16.

To summarize, there was no basis in law or fact for this Court to dismiss this Case on the merits, and such a dismissal constitutes an abuse of discretion or error of law which should compel this Court to either rehear this Case or grant a new trial in this Case. In the alternative, the Relator has an absolute right to have this Court explain its reasoning justifying its Judgment Entry of dismissal.

* * * * * * * * * * *

Since the Relator is forced to guess as to why this Court has changed its mind, he can only assume that he has personally lost the favor of this Court as the hostility of this Case has escalated. The Relator has a few words to say about that posture in his attached Affidavit; however, no matter what this Court may feel about the tenor of this Case or the Relator, that is no reason to dismiss this Case on the merits.

When this Court originally accepted this Case for a determination on the merits by denying the Motions to Dismiss and for Summary Judgment, two concrete issues were presented. First, the Relator asked this Court to order the Respondent to enter a default judgment in his favor, because the Defendants Below had failed to answer or otherwise defend in the Case Below. The Relator's argument was that Ohio's Civil Rule 55 was modeled after the federal rule, that in the federal sphere such a determination was held to be ministerial, and that under the applicable Ohio case law, mandamus would lie against a judge to perform ministerial tasks. Second, the Relator asked this Court to order the Respondent to refer Salamon to the disciplinary process for his admitted ethical violations. The Relator's argument was that such referral was mandatory under the Code of Professional Responsibility. This second claim squarely presented this Court—for the first time—with the opportunity to define the parameters of Civil Rule 11 and DR 1-103. These matters are un-

Finally, on or about February 27, 1991, the Supreme Court of Ohio DENIED the Relator's Motion for a Rehearing. This

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doubtedly of great public importance. *E.g., Haubeil & Sons Asphalt & Material, Inc. v. Brewer & Brewer Sons, Inc.*, 57 Ohio App. 3d 22, 23, ___ N.E.2d ___, ___ (Ross 1989) (Grey, P.J., dissenting) ("I would add that . . . it would be particularly helpful to the bench and bar if the Ohio Supreme Court would make a definitive holding about the purpose and use of Civ[il] R[ule] 11." *Id.* at 24, ___ N.E.2d at ___.).

Implicit in the Relator's Petition was the opportunity for this Court [to] redefine the standard for original actions against the judiciary. Under the current case law, whether or not the writ issues in such instances ultimately depends upon whether or not the conduct (or lack thereof) is discretionary or ministerial. However, the body of case law in this State provides little guidance as to which actions of a judge are ministerial and which are discretionary, probably because the determination is not black-and-white but rather lies on a continuum. In the extreme, some member of this Court apparently believe that the extraordinary writs should not be applied whatsoever against the judiciary. The Relator has offered a new tack. The Relator argued that this Court should re-explain the rule of such cases in the context of whether the judicial officer was bound by mandatory authority through Canon 3. As the Relator has already set-out in his Briefs, this Court already implicitly uses such a standard to determine the issuance of the writ, and it has in the past issued writs concerning "discretionary" acts where the court determined that the failure of the judicial officer to follow the mandatory authority was an abuse of discretion. Likewise, in this scope, is this Court's rule that the adequacy or availability of a remedy at law is irrelevant to such writs when this Court is exercising its supervisory jurisdiction over lower courts. Conceptually, just like disqualification and legal malpractice are private remedies to enforce the Code of Professional Responsibility, so to[o] are disqualification and the extraordinary writs against the judiciary private remedies to enforce the Code of Judicial Conduct. This Court once felt that theses issues were of significance. The Relator hopes that this Court will come once again to that belief.

* * * * * * * * * * *

In conclusion, and for the foregoing reasons, this Court should GRANT the Relator's Motion to Rehear its Judgment Entry dismissing this Case and/or the Relator's Motion for a New Trial; this Court should VACATE that Judgment Entry; and this Court should REINSTATE this Case on this Court's Merit Docket with SCHEDULED ORAL ARGUMENT. In the alternative, this Court should GRANT the Relator's Motion for this Court to explain the reasons supporting its Judgment Entry of dismissal.

Relator's Motion for Rehearing and/or or a New Trial *or in the Alternative* for an Explanation, at 4-9 (footnote omitted).

Judgment Entry is reported at 58 Ohio St. 3d 704, ___ N.E.2d ___ (1991).

IX. *Hinton v. Dillon Co.*, No. 11586 (LEXIS, Ohio library, Appellate file) (Summit Jul. 18, 1984)—

IN THE NINTH APPELLATE JUDICIAL DISTRICT OF OHIO
THE COURT OF APPEALS FOR SUMMIT COUNTY

Michael Hinton, Plaintiff-Appellant
v.
The Dillon Company, Defendant-Appellee

C.A. No. 11586

Slip Opinion

July 18, 1984

Unreported.

PRIOR HISTORY:

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, COUNTY OF SUMMIT, OHIO, CASE NO. CV-81-11-2998—

COUNSEL:

MARK H. LUDWIG, Attorney at Law, 863 N. Cleveland-Massillon Rd., Akron, OH 44313 for Plaintiff.

DEAN WESTMAN, Attorney at Law, P.O. Box 1500, One Cascade Plaza, Akron, OH 44308 for Defendant.

JUDGES: BAIRD, P.J., HOFSTETTER, J., CONCUR.

HOFSTETTER, J., retired Judge of the Eleventh District Court of Appeals, sitting by assignment pursuant to Article IV, § 6 (C), Constitution.

OPINION BY: MAHONEY, J.

OPINION: DECISION AND JOURNAL ENTRY.

This cause was heard June 25, 1984, upon the record in the trial court, including the transcript of proceedings, and the briefs. Oral argument was waived by counsel for the parties and the matter was submitted to the court. We have reviewed each assignment of error and make the following disposition:

Plaintiff, Michael Hinton, appeals a trial court order dismissing his case with prejudice pursuant to Civ. R. 41 (B) (2) and entering judgment in favor of defendant-appellee, The Dillon Company. We reverse and remand for further proceedings.

Plaintiff-appellant, Michael Hinton, filed a complaint in the trial court alleging that defendant-appellee, The Dillon Company (Dillon), violated R.C. 4123.90 by laying him off and subsequently discharging him because he pursued his rights under the Worker's Compensation Act. Hinton requested reinstatement and back pay. Dillon answered denying that either the lay off or the discharge involved retaliatory motivation.

Dillon's motion to strike Hinton's jury demand was granted. After trial to the court, Dillon's motion for an involuntary dismissal pursuant to Civ. R. 41 (B) (2) was granted. Judgment was entered in favor of defendant.

ASSIGNMENT OF ERROR II—

"The trial court erred in granting a renewed motion for involuntary nonsuit upon close of all evidence without entering findings of fact and conclusions of law."

Civ. R. 41 (B) (2) states:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has

> shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 if requested to do so by any party.

In the instant case, Hinton made a timely request for written findings of fact found separately from conclusions of law. None were issued. The requirements of Civ. R. 52 may be satisfied where the trial court issues a memorandum opinion reciting facts and legal conclusions if the ruling forms an adequate base upon which to decide the legal issues presented. *Stone v. Davis* (1981), 66 Ohio St. 2d 74.

In the instant case, the judgment order merely states: "[t]he court, having granted defendant's Rule 41 (B) (2) motion for involuntary dismissal at the close of all evidence in the above-captioned matter, hereby ORDERS that plaintiff's action is dismissed and final judgment is hereby entered in favor of the defendant. Costs to be paid by the plaintiff."

Like Civ. R. 52, Civ. R. 41 (B) (2) confers a substantial right on the parties and imposes a mandatory duty on the trial court. Refusal to comply with a proper request under Civ. R. 41 (B) (2) constitutes prejudicial error. *Orlow v. Vilas* (1971), 28 Ohio App. 2d 57; *Akron Standard Greenbaum Brothers Foods v. P B & G Corp.* (March 16, 1983), Summit App. No. 10876, unreported; and *Real Estate Data & Appraisal Corp. v. Record Research, Inc.* (August 25, 1982), Medina App. No. 1147, unreported.

ASSIGNMENTS OF ERROR—

"I. The trial court erred by denying jury trial in an action pursuant to Revised Code § 4123.90.

"III. The particular facts herein, in light of the trial court's repeated negative comments towards appellant and his case, show

the trial court erred in entering judgment for defendant."

Failure to comply with Civ. R. 41 precludes us from reaching the remaining assignments of error.

We sustain appellant's first assignment of error. We reverse the judgment and remand this cause to the trial court to file findings of fact and conclusions of law and to enter judgment in accordance therewith.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22 (E).

Costs taxed to appellee.

Exceptions.